

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





*Our office copy*

# 77-6069

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P/S*

To be argued by  
JANIS G. SCHULMEISTERS

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## United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6069

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MORAN TOWING & TRANSPORTATION CO., INC.  
and Tug JUDY MORAN, her engines, tackle, etc.,  
*Defendants and Third-Party  
Plaintiffs-Appellants,*  
—against—

UNITED STATES OF AMERICA,  
*Third-Party Defendant-Appellee.*

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### BRIEF FOR APPELLEE UNITED STATES OF AMERICA

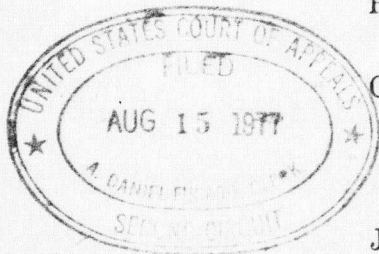
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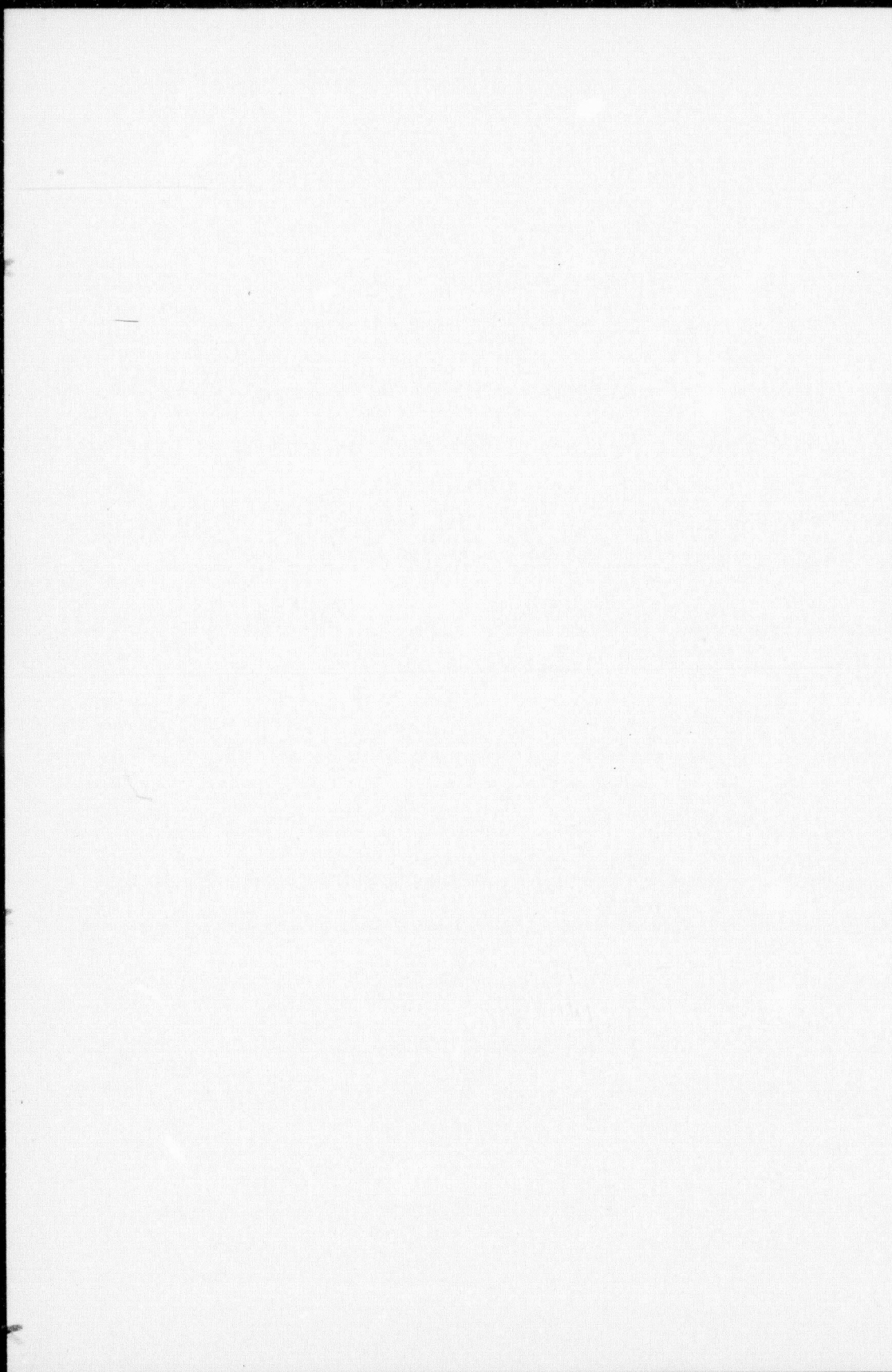
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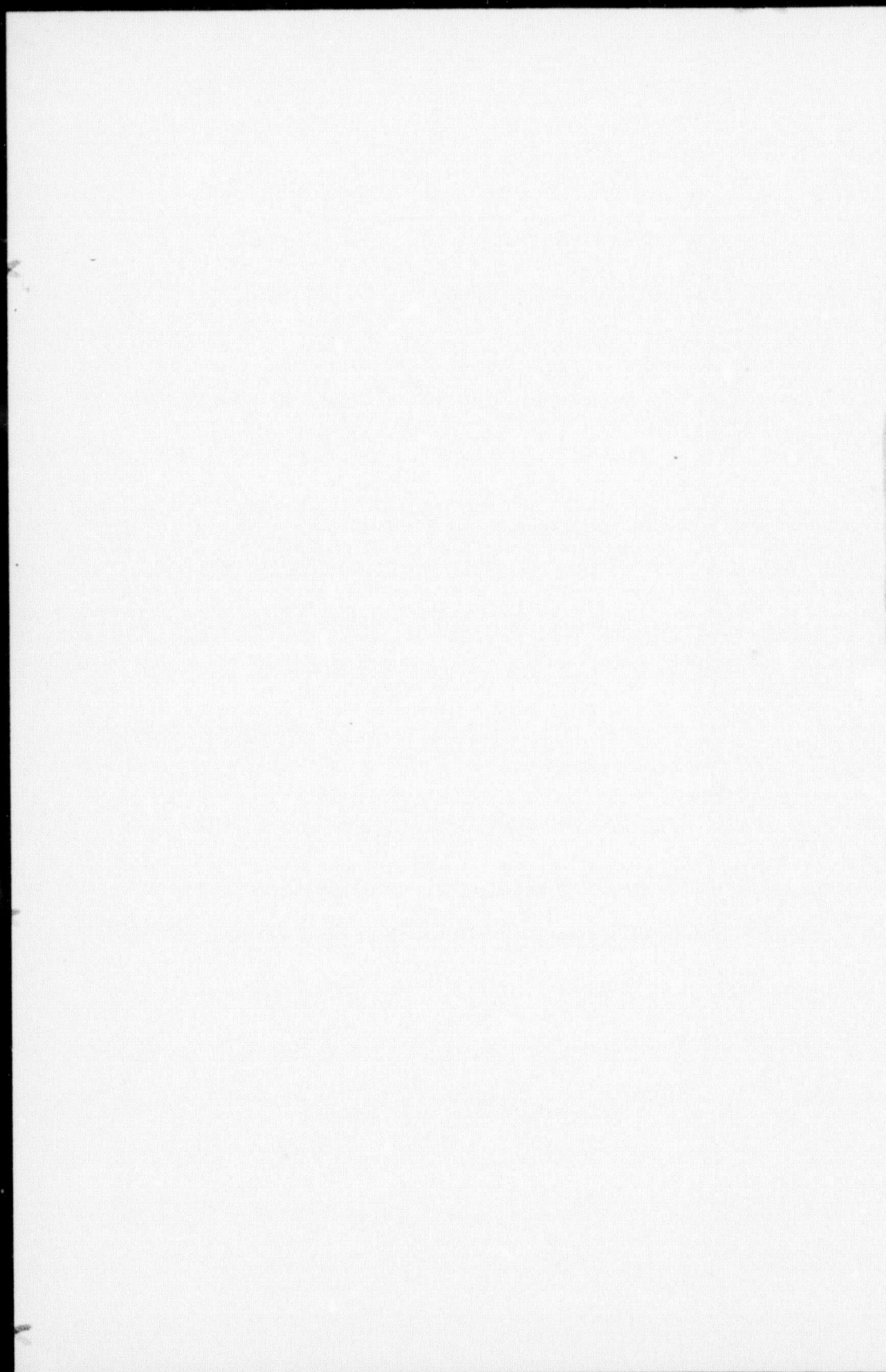
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**BRIEF FOR APPELLEE UNITED STATES OF AMERICA**

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**Statement**

Can a tug owner, who places a man not qualified as a Hudson River pilot in charge of the navigation of a 430 foot flotilla (the equivalent of an ocean-going tanker) and tells him to proceed up the Hudson River at night, obtain indemnity from the United States when the flotilla is negligently run outside of the charted navigation channel?

Shortly after midnight on October 18, 1973, the 340 foot long 70 foot wide barge B 95 loaded to a draft of 21 feet 6 inches was pushed by the 107 foot tug JUDY MORAN during ebb tide outside and to the east of the 32 foot dredged channel on to a charted 17 foot shoal.

Bouchard Transportation Co., Inc., the operator, and B No. 95 Corporation, the owner of the barge (Bouchard) sued Moran Towing & Transportation Co., Inc. (Moran) who impleaded the government.\*

Originally in its third-party complaint Moran alleged the government's negligence to be the failure to maintain buoy 35 on the westerly side of the channel on station; the failure to show "the rocky obstruction" on the chart; that the waters containing the "rocky obstruction" were part of the dredged channel;" and that the government "failed to mark its position . . ." (6a)\*\* When the Pre-trial Order was filed in May 1976, Moran added the additional charge of "failure to provide the navigator with a range" (page 3 of document 23 of the Record on Appeal), and at trial added the additional claim that the scale of the chart was too small.

The District Court in its opinion dated March 9, 1977, found that the position of buoy 35 on the westerly or left hand side of the channel was not the proximate cause of the grounding to the east of the dredged channel; that the tug captain Maynard steered the flotilla some 100 feet outside of the channel; that there were inconsistencies in Maynard's testimony; and rejected the additional charges of negligence.

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\* Prior to trial Moran settled Bouchard's claim for \$365,000.00, thus at the trial before the Honorable Dudley B. Bonsal on October 5 and 6, 1976, the only parties were Moran and the government.

\*\* References to the Joint Appendix pages will be by page number followed by letter "a", and preceded by name of witness when the reference is to testimony; page references to the trial transcript will have the name of the witness followed by "Tr." and page number; deposition references will be by "dep." References to exhibits in the Joint Exhibit Volume will be by "Ex." followed by the exhibit number and page, such as "E-1"; if not reproduced there then "Ex." and the exhibit number.



In this "clearly erroneous" appeal Moran strains to find some theory for passing its liability for negligent navigation and failure to use a qualified pilot on to the government. This should not be permitted.

### **Counter-Statement of Issues**

The real issues are:

1. Whether the District Court erred in choosing one of three versions of navigation testified to by the captain of the JUDY MORAN in making a finding with respect to the point of grounding.
2. Whether the Court properly decided that the position of buoy 35 on the westerly or left hand side of the channel did not cause the flotilla to go out of the channel on the right or easterly side, where mariners can and do use the existing fixed aids on the easterly side to navigate within the properly charted dredged channel limits.
3. Whether the Court properly dismissed Moran's other theories consisting of a request for a specific "rock" label next to the 17 and 19 foot charted depths outside of the dredged channel, a range, a larger scale chart, and another buoy.
4. Whether excluding Exhibits 11, 12 and 13 for identification amounts to reversible error under the circumstances.

### **Summary of the Government's Contentions**

- a) The casualty was caused by Moran's failure to employ a properly licensed Hudson River pilot and the consequent negligent navigation of its tug captain Maynard in the following respects:

1. The JUDY MORAN attempted a passing at a bend in a channel.

2. The JUDY MORAN did not reach a proper passing agreement.
  3. The JUDY MORAN started its turn too late.
  4. The JUDY MORAN failed to properly utilize the fixed aids to navigation and the chart available to her.
  5. The JUDY MORAN failed to utilize her radar, which at a glance would have shown that she was standing into danger.
- b) With three conflicting versions of navigation by Maynard, and other contradictions in his testimony, the District Court properly could and did choose the version given at the pre-trial deposition which shows that the flotilla proceeded outside and to the east of the dredged channel and struck a charted 17 foot shoal.
- c) The District Court properly found that the position of buoy 35 about 50 feet into the channel did not cause and did not contribute to the casualty.
- d) Moran's other allegations of negligence were properly dismissed.

### **Counter-Statement of Facts**

Moran's omission of a number of relevant facts requires their restatement.

On the night of October 17/18, 1973 in clear and calm weather with good visibility the 107 foot tug JUDY MORAN was pushing the 340 foot oil barge B 95 loaded with petroleum products to a draft of 21 feet 6 inches northbound in the Upper Hudson River (Maynard 26a-28a, 32a, Exhs. 4 and 36 at E-4 and E-20 respectively).

The bow of the tug was secured in the pushing notch in the stern of the barge making the flotilla about 430 feet long (Maynard 85a). The navigation was directed from the wheelhouse of the tug and all points abeam are with respect to the tug's wheelhouse aft of the stern of the barge (Maynard 85a-86a).

The JUDY MORAN was equipped with a gyro compass, radar, a VHF radio and a searchlight (Maynard 27a, 34a, 115a-117a). Chart 284, covering the relevant area of the Hudson River was on the chart table by the radar used by the mate Ferguson; Maynard did not use the chart nor the radar and Ferguson made no reports to Maynard (Maynard 34a-36a, 113a-114a, 132a, 363a). Although Maynard had stood a six hour watch in the morning and the last six hours on October 17, at midnight on the 18th he remained in charge of the navigation because Ferguson "was not acquainted at all with this area of the river" (Maynard 32a, 34a, 36a). Maynard was not licensed as a Hudson River pilot (Maynard 76a, 357a, Cf. 73a and 75a) although on other occasions Moran had engaged Hudson River pilots to pilot their tugs pushing barges on the Hudson River (Aitken 177a-178a; Sullivan 196a) and in December 1964 a barge towed by a Moran tug had stranded on rocks outside of the channel south of Houghtaling Island (Sullivan 224a-225a, 227a-228a; see copies of correspondence annexed to government's answers to supplemental interrogatories, document 27 of Record on Appeal).

Chart 284 shows the river, the shoreline, the aids to navigation, the dredged channel with a tabulation for the depths in its various reaches and contains the following warnings:

**"CAUTION**

Improved channels shown by broken lines are subject to shoaling, particularly at the edges."



### “CAUTION

Temporary changes or defects in aids to navigation are not indicated on this chart. \* \* \*

### “NOTE A

Navigation regulations are published in Chapter 2, U.S. Coast Pilot 2, \* \* \*

The Coast Pilot warns that the bottom is rocky in many places in the Hudson River and that pilots should be taken by all except small boats (Maynard 100a-102a; Aitken 180a). The Light List, Ex. C1 at E-23, also warns mariners that floating aids, such as buoys, are moored to scopes of chain several times the depth of water in which they are located, that they may be off-station for a variety of reasons, and that buoys should, “therefore, be regarded as warnings or guides and not as infallible navigation marks.” \* On September 26, 1973, buoy 35 was inspected and found on station (Tr. 199). This was the last inspection by the Coast Guard of the buoy prior to the casualty on October 18, 1973.

### The Geographical Area

The relevant area on C&GS Chart 284 is between Stuyvesant anchorage and the range at New Baltimore, west of Houghtaling Island (see chart Ex. 6, E-10). The channel depth tabulations show the dredged channel to be 400 feet wide in most places with a controlling depth of 32 feet, except for:

- (a) the area of the Stuyvesant anchorage which provides a deep area to the right and outside of the channel, where an upbound vessel with an ebb

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\* For a full text of these warnings we respectfully refer the Court to Ex. C1 at E-23.



tide can wait until a downbound vessel passes (see Sullivan 198a-200a, 213a-214a; Maynard 128a-129a; Aitken 165a).

- (b) the area near buoy 34 where the dredged channel turns about 23 degrees to the left from a direction of  $018^{\circ}$  true (for an upbound vessel) to a true direction of  $355^{\circ}$ , where the widest part of the channel in the area of buoy 34 is about 500 feet, gradually decreasing to the 400 foot project width.

For a northbound vessel all aids to navigation on the right or easterly side of the river bear even numbers and those on the left or westerly side have odd numbers. Thus, the easterly or right hand side of the river has the following aids to navigation:

*Unlighted Buoy 30*, at the northerly limit of Stuyvesant Anchorage (pos. "1" on Ex. 6, E-10).

*Light 32*, a fixed aid on a 46 foot high tower outside of the channel, in line with the easterly edge of the next reach referred to as Stuyvesant Light (pos. "5" on Ex. 6). The tower and the Light have existed since 1829 (Ex. C3 at E-25).

*Lighted Buoy 34*, near the turn in the channel, located 100 feet outside of the channel; a fact that is stated in the Light List (see Ex. C3, E-25).

*Light 36*, a fixed aid on a 24 foot high tower at the end of a dike at the southerly end of Houghtaling Island. It is also known as the Dike Light (pos. "3" on Ex. 6).

*Unlighted Buoy 38*, at the next turn in the channel.

*Light 40*, a fixed aid on a 25 foot high tower outside of the dredged channel. A vessel navigated on a straight line between Light 32 and Light 40 remains at all times in the dredged channel and on the right hand side of the dredged channel until the vessel reaches the New Baltimore range by Houghtaling Island on the next reach. The true direction of this line is  $354^{\circ}$  true. Maynard claims he was on this line prior to and at the time of the casualty (Maynard 99a-100a).

The westerly side of the river has the following aids:

*Light 29*, a fixed aid on a 24 foot high tower outside of the westerly edge of the dredged channel, opposite the northerly end of Stuyvesant Anchorage.

*Lighted Buoy 35*, at the westerly edge of the dredged channel, where the channel width is 400 feet. This is the buoy, the body of which after the accident, was found 50 feet into the channel (pos. "2" on Ex. 6).

*Unlighted Buoy 39*, at the next turn in the channel at Matthew Point, where the New Baltimore range reach begins (pos. "6" on Ex. 6).

*The New Baltimore range* consisting of two fixed lights in line showing the center line of the dredged channel northward of Matthew Point. Also shown on Maynard's diagram, Ex. 36, E-22).

Just outside and to the east of the dredged channel, there are three depths shown on the chart south of Houghtaling Island Dike Light 36: a 21 foot sounding, a 19 foot sounding and a 17 foot sounding. The latter two have been marked as positions B and C on Chart Exhibit 24. The 19 foot depth corresponds to the 18.8 foot sounding on the Corps of Engineers' surveys and

the 17 foot depth to the 17 foot sounding (see position A on Ex. 7, and the notation "Bug Is. Lt." on Exhibit 27).\*

The 17 foot sounding is approximately 100 feet to the east of the dredged channel line and is the base of the old Bug Island Light. The 18.8 foot sounding corresponds to the 19 foot shoal shown on the chart and is 12.5 feet outside of the channel.\*\*

### The Navigation

The flotilla proceeded northbound in the Upper Hudson River at a speed of 6-1/2 knots over the ground, through an ebb current of 3/4 knots (Maynard 32a, 112a-113a; Ex. 4; Eliassen 236a). When it reached the lower end of Stuyvesant Reach, Maynard ascertained by VHF radio that the downbound MORANIA 300 was approaching Coeymans (Maynard 36a; see Eliassen 235a, 237a). Coeymans is about 1-3/4 miles north of New Baltimore. (Measurement on chart Ex. 6).

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\* In referring to Exhibit 27, the Army Corps of Engineers survey on November 2, 5, 1973, we request that the Court look at the original exhibit, as the reproduction in the Joint Exhibit Volume on page E-19 is a photo reduction without a scale and more importantly, does not show the notation "Bug Is. Lt." near the 17 foot sounding, which is on the original—and also is shown on Annex B reproduced in its entirety at E-28.

\*\* We take strong exception to Moran's argument on pages 7-8 of its brief that the distance between the easterly edge of the channel and "the obstruction which damaged the B 95" was never in contention. The point of the striking was always in contention. The fact that the 19 foot shoal was 12.5 feet from the edge of the channel is not in contention. A glance at the chartlet annexed to Moran's pre-trial memorandum reproduced on E-26 in the Joint Exhibit Volume shows that Moran at the beginning of trial was arguing that the 17 foot shoal was the place of grounding. Moran's contrary implication at pages 7 and 8 of its brief is not correct.



The MORANIA 300 was a self-propelled barge 298 feet long, 43 feet wide and was proceeding at a speed of about 8-1/2 knots (Eliassen 237a). Before midnight she was navigated by her master, Captain McConnel, who was relieved at Coeymans by her alternate Captain Eliassen (Eliassen 235a, 237a).

When the JUDY MORAN was in the area of Stuyvesant anchorage (Upper Bronx Light), Maynard observed the MORANIA 300 in the area of the New Baltimore range (Maynard 37a-38a). He claims that at this point a passing agreement "on one whistle" was reached by use of the VHF (Maynard 38a). The testimony of Eliassen is different. Eliassen said that when he relieved "McConnel just informed me that he had heard JUDY MORAN was upbound with a barge." (Eliassen 235a-237a). Eliassen further testified that he had no communications with the JUDY MORAN when he saw her and that the JUDY MORAN only called him on the VHF ten minutes after the two vessels passed and the casualty had occurred (Eliassen 239a-241a, 246a, dep. 29-30; Maynard 49a). Eliassen reiterated this as follows:

"Q. The question is did you exchange any whistle signals? A. No, we did not, we used searchlights to signal.

Q. Did you talk to him on the radio? A. No, not until later, when he called me, about ten minutes." (Eliassen dep. 29-30; also see pp. 9-10, 11, 239a-241a).

The northbound flotilla and the MORANIA 300 passed in the area of buoy 35 100 feet apart during which maneuver buoy 35 was obscured to Maynard (Maynard 44a; dep. 45-46; Eliassen 242a). Thereafter, the barge struck a shoal or a submerged object.

Maynard's evidence shows three versions of how he navigated and where his flotilla was at the time of the striking.



*The first version* is recorded in his log entry (Ex. 1, E-1), the daily tug report (Ex. 2, E-2), his report to the Coast Guard (Ex. 4, E-4), and in his damage report (Ex. 36, E-20 to E-22). In all he says the barge "struck submerged object" or "bottom lump in near midchannel approximately 300 feet south of Houghtaling Island Dike LT/BN" or "midchannel approximately 300 feet south of LT/BN '36'" (Ex. 36 at E-21; Cf. Exhs. 1, 2 and 4).\*

Particularly, in the diagram prepared in his damage report Maynard drew the flotilla in the middle of the dredged channel, about a barge length from Dike Light 36 heading for Houghtaling Island Light 40 (Ex. 36 at E-22, although there he has numbered Houghtaling Island Light as light "42"; Maynard 108a-110a).

Significantly, this diagram shows the Houghtaling Island, its light, the Dike Light, the New Baltimore Range, buoys 38 and 39, the channel and the position of the tug and the barge in mid channel. Even more significantly, this diagram *does not* include the area of the channel where buoy 35 is located; it *does not* include the turn in the channel where buoy 34 is located, nor any reference to the Stuyvesant Light 32 nor the area

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\* Again, we request the Court to look at the original exhibits, as the reproductions in the Joint Exhibit Volume, particularly Ex. 4, are almost illegible.

Also, Moran's assertions on page 5 of its brief that Maynard's log entry and the pencil stroke opposite the 19 foot sounding were made "before reaching Albany" are questionable. He did not have the Coast Guard report form Ex. 4 until after he reached Albany, and that also gives the location of casualty in item 18 as "midchannel approximately 300 feet south of LT/BN 36". His original chart was not available at his deposition, but he had worked on it with other Moran pilots (Maynard dep. 19-21; 358a-360a).

Furthermore, contrary to Maynard's assertion at trial that "I had the latest charts aboard (Maynard 34a), his chart (Ex. 3) was actually an outdated chart as it shows buoy 35 as an unlighted buoy (Cf. Ex. 3 at E-3 and Ex. 6 at E-10).

of 19 and 17 foot depths outside of the channel, as all these are further to the south. It *does show* the flotilla in midchannel.

The following testimony highlights the fact that Maynard did not navigate with respect to buoy 35 but used other aids:

A. As I understand it, he wants to know just precisely how I was navigating.

THE COURT: That's right, that is what he is asking.

A. Also, I had the searchlight directed on Buoy 39.

Q. 39? A. Yes, sir, that is the black can buoy off of Matthews Point, and the range, I could see the New Baltimore Range Light cracked open to the left just almost in range with that black can buoy where I considered myself in fair water. That is about all the ways that I know to check going up and down that range.

BY MR. SCHULMEISTERS:

Q. I believe your last response was that you were lined up with one of the lights from the New Baltimore Range across Buoy 39. A. No, I was not lined up with them. I had the searchlight on that buoy and noted that the New Baltimore Range was cracked to the left, almost in line with the buoy, just for all intents and purposes in range with that buoy.

Q. And that is what you tried to depict on the diagram which is the third page of Exhibit 36, is that correct? A. Yes, sir.

Q. That shows the point as you knew it when you were drawing the diagram when the barge struck, whatever she struck? A. Yes, sir. (Maynard 87a-88a).

According to this version the flotilla was nowhere near buoy 35 and Maynard was not navigating the flotilla with respect to that buoy. Rather, he had steadied on course 355°, within a degree, heading for Light 40 with Light 32 under his stern before passing the MORANIA 300 (Maynard 99a-100a).

If true, the casualty could not have occurred outside of the channel as the flotilla would then be in the dredged channel. A vessel navigated on a straight line between Lights 32 and 40 remains at all times in the dredged channel of this reach (see Chart Exs. 3, 6, and 24). Also, as stipulated at trial, the damage to the 70 foot wide barge was on the starboard side *close to the center line* straight fore and aft, not on the starboard side (Tr. 260-261).

The District Court obviously disbelieved the first version as it found that the flotilla went outside of the channel, despite Maynard's assertions to the contrary. Maynard's prior deposition testimony, confirmed by him at trial, was different.

*The second version* which the court below accepted, is that from a position off Stuyvesant Anchorage, Maynard steered a course of 18° true or even 20° true until he reached a point near unlighted buoy 30 when he steered a course of 5°, or a couple degrees to the right, which course he held until the vessels passed and he was abeam of buoy 35, only then turning to a course of 354° or 355° true, steering for the Houghtaling Light 40 (Maynard dep. 24-25, 45-48, 52-53; also at 81a, 93a, 119a-124a, and 361a-362a, 365a). For the convenience of the Court the deposition testimony is set forth in the margin.\* Such

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\* Q. What course were you steering when you were near Light 27? A. I would say the approximate course, because in this channel here, the buoy is much further in. The approximate course was 18.

\* \* \*

[Footnote continued on following page]



Q. Is that true or magnetic? A. That is true.

Q. Did the JUDY MORAN have a gyro compass? A. Yes, she did.

Q. Did she have a gyro error? A. To my knowledge, at that particular moment, no, but I will say the vessel itself had one of those gyros that sometimes too gave use belief it was and sometimes—well, after I make a swing and she steadies down, I don't believe she has an error, no. But I must point out, in the river, with all the aids to navigation visible, steering courses can be—you can only steer within 1, 2 or 3 degrees at a time. The ship will move back and forth and if you find yourself—and if I find myself what I consider on the wrong side of my fairway, or out of position in the fairway, I do try to correct it, so I will not steer a 118 or an 18 course up here (indicating). I will steer 120, until I get shaped up to what I consider right.

Q. You mean 20, not 120? A. Yes, that's right. I don't know what 100 got in the way. (Maynard dep. 24-25).

\* \* \*

Q. Will you mark on here, please, where you passed? A. Right in the way of this buoy here (indicating).

Q. And that is in the area of Buoy No. 35? A. Yes. (Maynard dep. 45-46).

\* \* \*

Q. Approximately how far was the port side of the barge, BOUCHARD 95, from the MORANIA 300? A. I would estimate about 100 feet.

Q. That is from the port side of the MORANIA? A. Yes.

Q. 100 feet in between the two vessels? A. Yes.

Q. What course were you on at the time you passed at Buoy 35, marked "C" on the exhibit? A. I was steering approximately a course of 5 here.

Q. Yes. A. Or what I tried to steer was a course of 5. If I am not coming here, I will adjust it, but the course is 5, and what I use from this particular buoy here, I change a course and steer for this dike light (Maynard dep. 46).

\* \* \*

Q. And then you steer for the dike light? A. Yes, until I am abeam of this buoy.

Q. The dike light is Light 36; is that correct? A. That's correct.

Q. And until you are abeam of this buoy—you mean Buoy 35? A. Yes, that is correct.

[Footnote continued on following page]

navigation brings the whole flotilla outside of the dredged channel before buoy 35 on the left side of the river is

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Q. So the change to a course of approximately 5 degrees was approximately in the area of Buoy 30; is that correct? A. Yes.

Q. And prior to that you were steering approximately 18? A. That's correct.

Q. Once you are abeam of Buoy 35, what course did you then steer? A. I steer right up for Houghtaling Island light here, which would be a course of about 355 or 354, somewhere in that neighborhood (Maynard dep. 47).

\* \* \*

Q. From there you steer— A. From there, up in between these two, between these buoys, I steer a course of approximately 354, 355.

Q. Heading for the Houghtaling light? A. Yes.

Q. Which is Light No. 40; is that correct? A. Yes. And that should leave Stuyvesant light here under my stern.

Q. Stuyvesant light is Light No. 32? A. Yes, that is correct (Maynard dep. 48).

\* \* \*

Q. How far away from buoy 34 did you pass? A. Oh, 150, 200 feet.

Q. That was on your starboard side? A. Yes.

Q. On what course were you then? A. The 005. I will not put Mr. Volk in a bind. I wouldn't say I wasn't steering to the right, judging this vessel coming down, but I was watching his position with regards to the—to that buoy here and estimating he was close to the buoy so he wasn't taking my part of the channel away from me. In other words, as to whether I was on a 005 course completely up there, I will not vouch, I will be honest with you.

Q. About how much of a difference would there have been? A. A couple of degrees. I am this way, too. I would never let another man have more than his share of the channel.

Q. You say you could have been about 2 or 3 degrees further to the right? A. That is correct." (Maynard dep. 52-53).

The significant points of the foregoing are:

- (a) The JUDY MORAN was on the course of 005° when she passed 150-200 feet from buoy 34;
- (b) that course was held until abeam of buoy 35; and
- (c) that when the MORANIA 300 was passed in the area of buoy 35, Maynard was still on the 005° course.

reached, heading for the 17 foot shoal about 100 feet outside of the channel, the old Bug Island Light base (see Annex B at E-28).

This was further confirmed by Maynard's admission that the tug was in the "bight" off buoy 34 (Maynard 83a-84a); Aitken testifying that it is "much too late" to start the turn when buoy 35 is abeam and that a turn should be made before buoy 34 is reached (Aitken 179a); and pilot Sullivan explaining why vessels should not meet in a bend in the river (Sullivan 199a-200a, 213a-214a).

*The third version* is the general description by Maynard during direct testimony at trial between pages 36a and 51a. Here he testified that from position near buoy 30 he steered for the Dike Light 36 which would bring him close to buoy 35, from which position he steered for the Houghtaling Light 40 trying to stay 100 feet to 200 feet from buoy 35 (see 45a), which would put him on the left hand side of the channel in that area; and that shortly after passing the downbound MORANIA 300 he felt three distinct shocks (45a-46a; see Ex. 6 and a course line drawn thereon). This is quite impossible if the downbound MORANIA 300 was passed in the area of buoy 35. His course line on Ex. 6, however, shows, in accordance with the second version, that he proceeded on the same course for quite a distance past buoy 34.

About two weeks after the casualty, upon Moran's request, the Army Engineers swept the channel in the area south of Houghtaling Island and found it clear (Wright 256a, 257a, 266a, 280a, 281a; Weindman 303a, 309a, 317a; see 321a-322a and 260a-262a).<sup>\*</sup> During the

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<sup>\*</sup> Moran's claim at page 5 of its brief that "the Coast Guard asked the Army Corps of Engineers to survey the area to determine what the barge had struck (256a, 302a)" is not correct. The two citations refer to Wright's testimony that the request

[Footnote continued on following page]



sweep outside of the channel, two high spots were found as they are depicted in the survey, Ex. 27, the original of which really is a composite showing the area approximately from buoy 30 up to and including the Dike Light, although soundings are only shown between the area of buoy 34 and the Dike Light. On April 28, 1975, Weidman resurveyed the area and found the channel still clear. (Weidman 322a-324a).

## ARGUMENT

### I.

**The District Court properly found that the flotilla struck the charted 17 foot shoal about 100 feet outside and to the east of the dredged channel and that the position of buoy 35 was not the proximate cause of the casualty (answering Points I and II).**

The thrust of Moran's appeal aims at the District Court's finding that the barge struck the remains of the old Bug Island Light about 100 feet outside of the channel where the depth at mean low water is 17 feet (see original Ex. 27 which has the notation "Bug Is. Lt." next to the 17 foot sounding). Despite the clearly plotted point and label "Bug Is. Lt." next to the 17 foot shoal about 100 feet to the east of the dredged channel on the survey, Moran argues that the 19 foot shoal 12.5 feet outside of the dredged channel is the old Bug Island

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for the survey was received from the Navigation Department of the Corps of Engineers and Weidman's testimony that he received a call from the New York office to do the survey. We shall have at oral argument copies of a letter from Moran to the Army Corps of Engineers dated October 26, 1973, which was not introduced in evidence, but clearly shows that the request for the survey came from Moran. Copies of that letter will be given to Moran when this brief is served and filed.

Light base, referring to Exhibit 5 at E-7, where the Coast Guard investigation report incorrectly states that the light house foundation was located 12 feet outside the channel (Moran's brief p. 8). In fact, there is no survey showing the old Bug Island Light or any other light at or near the 19 foot sounding. There is a 1909 chart, which was marked Exhibit 3 for identification during Radden's deposition (Radden dep. 30-31), which shows a small island then in the area about 100 feet to the east of the presently existing dredged channel. At trial the only survey or chart introduced into evidence showing the actual location of the old Bug Island Light was survey Ex. 27; hence there was no need for cumulative chart evidence to contradict the erroneous statement in Ex. 5 at E-7. The 1909 chart referred to by Moran at Tr. 270, shows the true position of Bug Island and Moran's arguments to the contrary are not correct.

All that aside, the District Court properly on substantial evidence found that the flotilla was navigated 100 feet outside of the dredged channel to the 17 foot shoal (Opinion 15a-16a). The District Court found:

"According to (Maynard's) testimony at trial, the flotilla was on a course of 005° as it passed within 150-200 feet of Buoy 34 before reaching Buoy 35 and that it remained on this course until it passed the MORANIA at the location of Buoy 35." (17a-18a)

Such a finding is solidly based upon Maynard's deposition testimony confirmed by him at trial (Maynard 93a, 119a-122a, 124a; see testimony quoted at pages 13-15 of this brief, *supra*). The Court then accepted the pictorial representation of such navigation on Annex B, reproduced at E-28.

This is the only version which makes sense. Had the 70 foot wide barge struck the 19 foot shoal, which is about 30 feet wide, the west starboard side of the bottom would have been damaged, not just close to the center line (Tr. 260-261; see Ex. 27 and cf. Ex. 7).

Among the various versions of the striking recorded and testified to by Maynard, the District Court, as the fact finder who observed Maynard, had to make a choice and properly chose the second, see *In Re Grace Line Inc.*, 517 F.2d 404, 406-407 (2d Cir. 1975).

The version found by the District Court is consistent with Moran's annex to its pre-trial brief where it labeled the 17 foot area as the "site of grounding" (E-26). It is consistent with Ex. 26, the 1963 survey showing sufficient water of 26 or more feet from the turn in the channel to the 17 foot depth (cf. Ex. 26 and Ex. 24). It is also consistent with Maynard looking for unlighted buoy 39 with his searchlight (Maynard 87a-88a), but inconsistent with his claimed navigation with respect to the fixed lights 32, 36 and 40 (cf. 95a, 97a-99a).

At trial Maynard attempted to change his earlier testimony by saying he had "an Italian-make gyro" that would not settle down (Maynard 119a; cf. no such comment on first day 27a, and no gyro error at deposition 362a). Moran's expert, Aitken, finally admitted that a properly working gyro does not hunt more than one-quarter of a degree (Aitken 173a-175a).

Aitken also testified that to stay in the channel, the turn to course 355° has to be commenced *before* reaching buoy 34 and waiting until buoy 35 is abeam is "much too late" (Aitken 178a-179a). Yet, Maynard waited past buoy 34 until after he passed the MORANIA and was abeam buoy 35 before turning (Maynard 121a-122a, 365a; also see course line by Maynard on Ex. 6 at E-10).



Certainly, the District Court was not "clearly erroneous" in finding that the barge struck the 17 foot shoal, see *McAllister v. United States*, 348 U.S. 19 (1954).

The reason for such navigation was explained by pilot Sullivan, who testified that he would not pass another vessel in the turn but wait at the Stuyvesant Anchorage (Sullivan 200a-201a) because the:

"Two vessels are swinging. The northbound vessel is looking at the red and green light coming down on him and I would wait for that straight-away. Over the 12 years I probably waited 40-50 times there.

Q. Can you explain why you would consider it not safe to pass off buoy 35? Let's say one vessel is 43 feet wide and the other is 70 feet. A. It is a bend in the river and you are swinging. It is very hard to have any relationship to the shore line. It is night time. Shadows. I wouldn't recommend it." (Sullivan 214a).

Even Aitken agreed that it is good practice to hold back and pass in a straight-away (Aitken 170a-171a).

Obviously, the position of buoy 35 had nothing to do with the casualty and the court was not clearly erroneous in so finding (18a), see *Matton Oil Transfer Corporation v. The Greene*, 129 F.2d 618, 620 (2d Cir. 1942); *The Socony No. 19*, 29 F.2d 20, 22 (2d Cir. 1928).

Moran's quotations from *Afran Transport Company v. United States*, 435 F.2d 213 (2d Cir. 1970) miss the point. First of all, that case deals with a professional pilot, which Maynard was not (see Point II, *infra*) and involves a completely different fact situation. The buoy involved there was the only aid to navigation within miles, see District Court opinion 309 F. Supp. 650, at page 656. In the instant case there were fixed aids near-

by. Also, the buoy marking the West Cod Ledge Rock had been off-station for many months, whereas buoy 35 was checked and found on-station on September 26, 1973 (Tr. 199). Furthermore, in the *Afran* case the professional pilot turned on the buoy, with nothing else around, as the nearest fixed aid was 3.1 miles away. Here, fixed aids, such as Lights 32 and 36, were within a few hundred yards and navigating on the line between Lights 40 and 32 would maintain the flotilla within a channel. Maynard also passed within 150 feet to 200 feet of buoy 34. Actually, the law and the cases cited by this Court at page 218 of the *Afran* opinion are critical of Maynard. When all is said and done, Maynard failed to take the trouble to look whether he was on that line between Lights 32 and 40 (see diagram on Ex. 36 where Maynard has marked only the lights and aids ahead of him). We submit Maynard's testimony as to his use of Light 32 was an afterthought.

Other cases cited by appellant are not applicable. *Greer v. United States*, 505 F.2d 90 (5th Cir. 1974) involved failure to follow recommendations to move a buoy from a position where it was usually affected by stormy weather, not the case here. *Trinidad Corp. v. SS SISTER KATINGO*, 280 F. Supp. 976 (S.D.N.Y. 1967), mentions the off-station position of the buoy without a discussion, the case really turning on the applicability of the "Pilotage Clause"; and *American Zinc v. Foster*, 313 F. Supp. 671 (S.D. Miss. 1970), *aff'd*, 441 F.2d 1100 (5th Cir. 1971), *cert. denied*, 404 U.S. 855 (1971), concerns a private aid where the keeper had actual notice of it being out and did nothing, together with an extension of a shipyard's shipway beyond the authorized distance, plus navigation by a licensed pilot.

The Court's finding that the position of buoy 35 did not contribute to the casualty but that it was due to Maynard keeping his 005° course past buoy 34 until he went out of the channel was proper and should be affirmed.

## II.

**Moran's failure to use a qualified pilot caused this casualty, not the diverse theories advanced by Moran (answering Points III, IV and V).**

Over a hundred years ago the Supreme Court laid down the standard for a river pilot in *Atlee v. N.W. Union Packet Company*, 88 U.S. (21 Wall.) 389 (1875):

\* \* \* (T)he pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. \* \* \* He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as . . . sunken rocks . . . All this he must know and remember and avoid . . . (p. 396).

Yet Moran placed in charge of the 430 foot flotilla carrying petroleum products an individual not qualified as a Hudson River pilot, together with a mate "not acquainted at all" with the river (Maynard 32a, 76a). While a tug alone does not require a pilot on the Hudson River, the Coast Pilot clearly warns that "all except small boats are advised to take pilots" (Maynard 102a). Also see McKinney's N.Y. Navigation Laws, § 89-a which provides in part:

"Every foreign vessel and every American vessel under register, except vessels proceeding otherwise than by sea and of less than three hundred gross registered tons \* \* \* shall take a Hudson river pilot licensed under the authority of this article \* \* \*"

The JUDY MORAN's gross tonnage is 275 (Ex. 4), hence technically no pilot was required. However, when



the 107 foot tug is placed at the stern of a 340 foot petroleum carrying barge, with all the potential for damage to the environment or explosion in case of a collision, the flotilla is no longer a "small boat." Even Eliassen of the 298 foot MORANIA had a Hudson River pilotage endorsement (Eliassen dep. 23). And Moran had previously used qualified Hudson River pilots (Aitken 178a; Sullivan 193a-196a). Without a qualified pilot, the flotilla was unseaworthy under the doctrine of *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). There Judge Learned Hand held the tugs unseaworthy for failure to carry radio receivers, even though there was no requirement to do so, and other similar vessels sometimes carried them, and sometimes not.

Maynard just did not know the Hudson River well enough despite his assertions of having sailed up and down the Hudson "several hundred" times (Maynard 26a). He readily admitted that he would not take a barge with a 21.5 foot draft over charted shoals of 17 and 19 feet regardless of the type of bottom (Maynard 92a-93a). The chart clearly shows the 17 and 19 foot soundings immediately to the east of the channel line and it is immaterial whether it is rock or some other type of bottom. Striking a charted obstruction raises a presumption of negligence, *Indian Towing Co. v. United States*, 182 F. Supp. 264, 270 (E.D. La. 1959), *aff'd*, 276 F.2d 300 (5th Cir. 1960), *cert. denied*, 364 U.S. 821 (1960), and other cases cited at p. 219 of the *Afran Transport Company* case, *supra*.

If, as Moran claims on page 17 of its brief, Maynard "had been over on the easterly edge of the channel before and never had any trouble," he did so at his own risk, which only further confirms the District Court's finding that he did so because of the courses he took; and because he attempted a passing at a bend in the channel. This time he ventured too far. This was negligence.

Also, acting as a pilot for a 430 foot flotilla, Maynard did not live up to the standards of a pilot. In *Essex County Electric Company v. M/S GODAFOSS*, 129 F. Supp. 657 (D.C. Mass. 1955), the Court held a Gloucester harbor pilot negligent for not searching and learning from the Boston Corps of Engineers' District Office the existence of a cable laid in 1938 when he snagged it in 1954, stating:

"The reason that a vessel employs a pilot . . . is in large measure because such an individual is expected to have local knowledge. Any competent navigator can read a chart and subscribe to Notices to Mariners . . ." (Page 659).

Pilot Sullivan knew the area was rocky (Sullivan 207a-208a, 224a-225a). Aitken knew that Army Engineers' surveys showing the bottom contours were available (Aitken 180a). Moran knew the area was rocky because of the grounding of the barge ALEXANDRA (See Sullivan 227a-228a; and documents annexed to the government's answers to supplemental interrogatories, document 27 of the Record on Appeal). Yet Maynard did not even attempt to obtain this information, but admitted having heard of these surveys and that nothing prevented him from obtaining them (Maynard 130a-131a, cf. 71a).

The uselessness of a range in a passing situation was demonstrated by Aitken's testimony and confirmed by Sullivan (Aitken 161a-164a; Sullivan 209a-210a, 217a-219a).

Similarly, a larger scale chart would be impractical. The channel would still be shown by dredged limit lines and, if a 1 to 10,000 scale were used, the mariner would then have 24 charts for the Hudson River, instead of 3 charts he now uses (Radden 348a, 353a-354a). This is clearly impractical. Most importantly, Moran ignores the fact that Maynard was not using the chart. The

chart was on the chart table at the after end of the wheelhouse used by mate Ferguson, who was comparing it with the radar picture, but made no reports to Maynard (Maynard 35a-36a, 113a-114a, 132a).

Had Maynard glanced at the radar he would have seen that he was standing into danger, as the radar shows the surrounding land, buoys, fixed aids and their relation to the flotilla (Maynard 27a, 114a-117a). Sullivan uses radar as a secondary check (Sullivan 201a-202a), and Moran's expert Aitken testified:

"I keep the radar turned on as much as I can, daylight and night time, because I familiarized myself with the river as a picture. When I look down in that radar, if it is dense fog, I know just exactly where I am, and I do. I coordinate the steering and the radar." (Aitken 175a).

Maynard did not even glance at it (Maynard 363a). It is negligence not to use radar when it is available and would help, see *Afran Transport Co. v. Bergechief*, 274 F.2d 469, 473-475 (2d Cir. 1960); *Standard Dredging Corp. v. S/S SYRA*, 290 F. Supp. 260, 264 (D.C. Md. 1968); *Continental Oil Co. v. M.S. GLENVILLE*, 210 F. Supp. 865, 871-872 (S.D. Texas 1962). Last, but not least, Maynard violated the statutory requirement to sound passing signals, see 33 U.S.C. § 203 and 33 C.F.R. §§ 80.3, 80.4 and the "second situation" in § 80.13(c); cf. Sullivan 210a-211a, 226a-227a.

Considering all of the above the District Court properly dismissed Moran's various claims.

The cases cited by Moran, we submit, again miss the mark. *DeBardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971) finally held the tug responsible for having an outdated chart, similar to Maynard's, which shows buoy 35 as an unlighted buoy, although a later edition was available, cf. Exs. 3 and 6. The thrust of the case was error in charting. There are no errors



on chart 284. Every shallow spot outside of the channel cannot be labeled "rock". The Coast Pilot gives that information. *Japan Line Ltd. v. United States*, 1976 A.M.C. 355 (E.D. Pa. 1975) [not otherwise reported] dealt with the failure to disseminate knowledge of a recently discovered obstruction *in the channel*, not outside the channel where Maynard had no business in view of the barge's draft and the charted soundings.

The same applies to *Richmond Marine Panama, S.A. v. United States*, 350 F. Supp. 1210 (S.D.N.Y. 1972). Moran ignores the Court's finding at page 1218 that a navigator 400 feet from the bow should stay 50 to 100 feet from the known rock ledge, here the 17 and 19 foot soundings just outside of the dredged channel line.

We respectfully submit that it ill behooves a tug owner, who fails to employ a properly qualified pilot, to seek some contribution from the government by diverse theories when his "navigator" ignores the information on the chart and the aids available to him and runs the flotilla outside of the dredged channel.

### III.

#### **The District Court properly excluded Exhibits 11, 12 and 13 for identification (answering Point VI).**

The District Court correctly stated the rule that subsequent establishment of buoy 34A is not evidence of negligence or of a pre-existing duty to warn, and properly excluded Exs. 11, 12 and 13 for identification. Certainly, Rule 407 of the Federal Rules of Evidence excludes evidence of subsequent remedial measures. Even knowledge of "several accidents in the area" without dates, the surrounding circumstances or anything more, we submit, does not have sufficient probative value to overcome Rule 407 (See Ex. 12 for id. at E-13).

It will be noted that the District Court read these exhibits (185a) and asked for a memorandum of law and then made a final ruling after due deliberation. (See 184a and 18a).

Moran overlooks two points. The Coast Guard does not have a duty to establish any aid to navigation, *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). The applicable statute, 14 U.S.C. § 81, states that "the Coast Guard *may* establish" aids to navigation. It is a discretionary function whether to establish an aid, *Indian Towing Co.*, *supra*; *Afran Transport Company v. United States*, 309 F. Supp. 650, 654 (S.D.N.Y. 1969), *aff'd*, 435 F.2d 213 (2d Cir. 1970), *cert. denied*, 404 U.S. 872 (1971). And failure to exercise discretion is not actionable, *Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976) applying the Federal Tort Claims Act's "discretionary functions" exception in 28 U.S.C. § 2680(a) to suits in admiralty. Of course, this also applies to establishment of ranges.

Secondly, the District Court found that the barge struck the 17 foot shoal some 100 feet outside of the dredged channel. To the extent that Exhibits 11, 12 and 13 for identification refer to the 19 foot shoal area, albeit their reference to the Bug Island being there is erroneous,\* they are irrelevant. The District Court did not err in excluding the exhibits from evidence. And even if the District Court did commit error, it was harmless.

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\* As we stated before, during discovery (Radden dep. 30-31) the 1909 edition of the chart was marked as Exhibit 3 for identification and it was available to Moran during trial (Tr. 270). It shows Bug Island in the area of the 17 foot sounding, about 100 feet outside of the later dredged channel, when it is compared with a chart today;—hence Moran's claims of Bug Island light base being in the area of the 19 foot sounding are surprising.

## CONCLUSION

The District Court correctly found that the flotilla was navigated some 100 feet outside of the dredged channel, that Moran failed to show that Buoy 35's being off station was the proximate or contributing cause of the casualty and correctly dismissed Moran's third-party action against the United States. The judgment below should be affirmed with costs to the appellee United States of America.

Respectfully submitted,

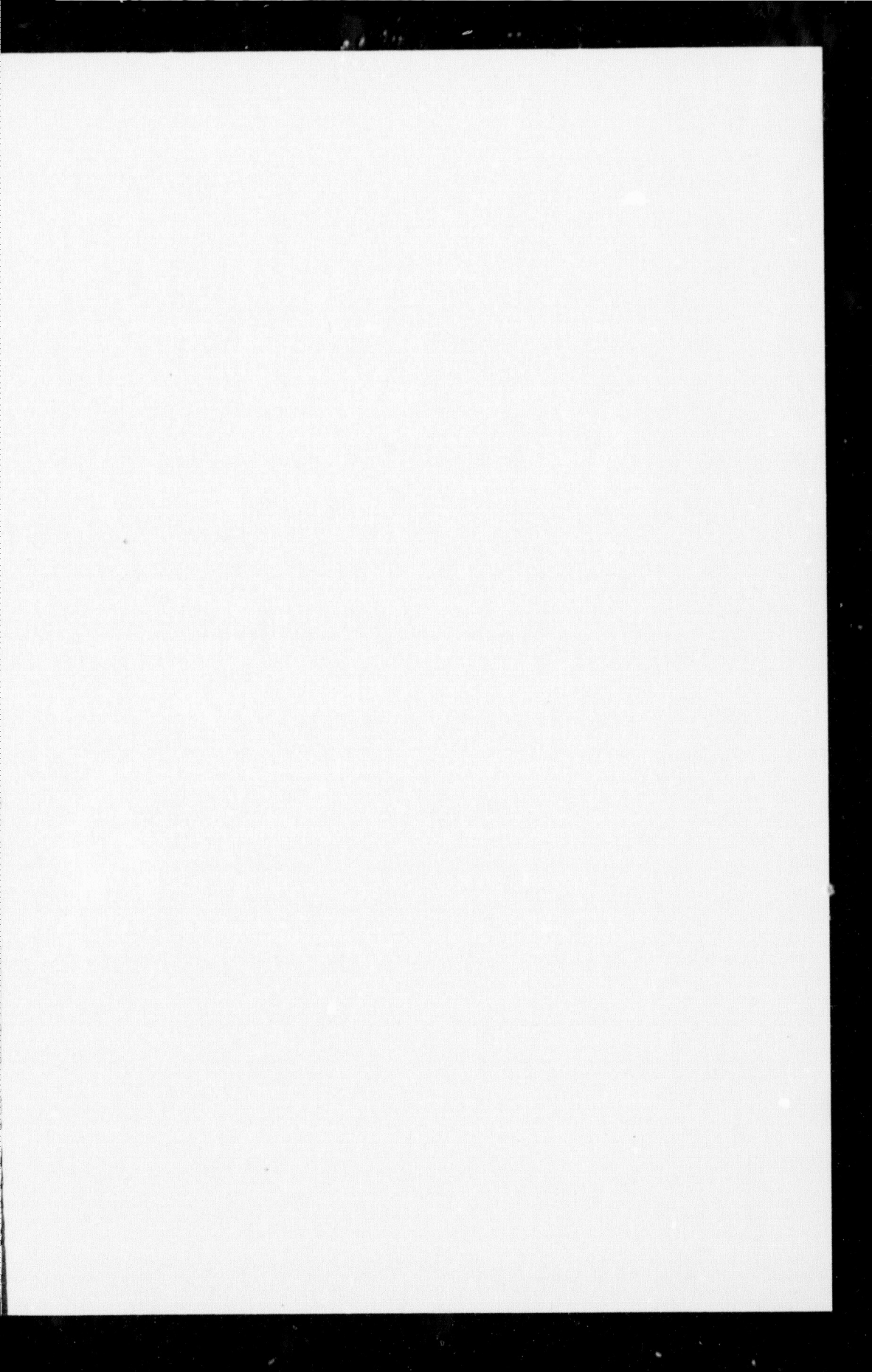
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